

IN THE
COURT OF CRIMINAL APPEALS
OF TEXASFILED
COURT OF CRIMINAL APPEALS
3/10/2022
DEANA WILLIAMSON, CLERK

DANIEL GARCIA,
Respondent,

v.

PD-0025-21

STATE OF TEXAS
Petitioner

RESPONDENT'S MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL
APPEALS:

NOW COMES Daniel Garcia, Respondent, by and through
undersigned counsel, and submits this Motion for Rehearing pursuant to
Rule 79 of the Texas Rules of Appellate Procedure.

This Court's March 2, 2022 opinion held that Garcia forfeited his
complaint regarding the assessment of restitution because he failed to
object in the trial court. Garcia argues that the opinion was wrongly
decided for three reasons: (1) No objection is required for an illegal
sentence, (2) the Court's new rule should not be applied retroactively, and

(3) there is no meaningful distinction between a factual basis complaint and an evidentiary sufficiency complaint.

(1) No objection is required for an illegal sentence

An illegal sentence is one that is not authorized by law. *Bell v. State*, 635 S.W.3d 641, 645 (Tex. Crim. App. 2021). Restitution is part of the sentence. *Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006) (“[R]estitution is punishment[.]”). The right to be sentenced legally is an absolute or waivable-only right. *Burg v. State*, 592 S.W.3d 444, 449 (Tex. Crim. App. 2020). “The contemporaneous-objection requirement does not bar review of a claim that sentence is illegal[.]” *Id.* An appellate court may always notice and correct an illegal sentence.¹ *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003). *See also Ex parte Hill*, 632 S.W.3d 547, 556 n.10 (Tex. Crim. App. 2021) (“Rule 33.1 of the Texas Rules of Appellate Procedure governing error preservation ‘does not bar review of a claim that a sentence is illegal due to the fact that it is outside the maximum . . . range of punishment.’”).

¹ It is worth noting that the State is allowed to appeal an illegal sentence. Tex. Code Crim. Proc. Art. 44.01(b). In fact, the State can appeal an illegal sentence even if the defendant does not appeal his conviction. *Pfeiffer v. State*, 363 S.W.3d 594, 601-02 (Tex. Crim. App. 2012).

Garcia argued to the Third Court of Appeals that the trial court had no statutory authority to award restitution to the Office of the Attorney General. The Third Court of Appeals agreed. This Court chose not to decide whether the trial court had authority to order restitution. Yet, if the trial court had no authority to order the restitution, Garcia has been assessed an illegal sentence. Under this Court's opinion he is now without recourse.

(2) The Court's new rule should not be applied retroactively

This Court's opinion announces a new rule regarding error preservation and restitution orders:

Under *Idowu v. State*, a propriety complaint must be preserved, but a factual-basis complaint may not need to be preserved because it could be construed as an evidentiary sufficiency complaint.

Garcia v. State, No. PD-0025-21, 2022 Tex. Crim. App. LEXIS 129, at *1-2 (Crim. App. Mar. 2, 2022).

[W]e abandon the factual basis/sufficiency-vs.-propriety distinction in the context of a restitution order and hold that even if Appellant's challenge were a factual-basis complaint that qualified as a sufficiency challenge, he would have forfeited it by his failure to object in the trial court.

Id. at *2-3.

When this Court overrules precedent regarding a prior rule, the Court is making a new rule. *Jordan v. State*, 54 S.W.3d 783, 787 (Tex. Crim. App. 2001). When a court disapproves a practice that it has arguably sanctioned in prior cases, that court is also making a new rule. *Griffith v. Kentucky*, 479 U.S. 314, 325 (1987). Generally, unless a new rule impacts “the truth-finding function,” new rules should not be applied retroactively. *Taylor v. State*, 10 S.W.3d 673, 682 (Tex. Crim. App. 2000). When a new rule adversely affects the accused, the following factors are to be considered in whether retroactively apply the new rule:

- (a) The purpose to be served by the new standards,
- (b) *the extent to which accused persons have relied and the prejudice they may suffer from application of the new standards*, and
- (c) the effect on the administration of justice of a retroactive application of the new standards.

Jordan, 54 S.W.3d at 787.

When Garcia was sentenced on April 19, 2019, he could reasonably have relied on the notion that if he failed to object in the trial court, he could still appeal an order of restitution that was unauthorized (illegal). On March 2, 2022 – nearly three years later – this Court holds that nope, you’ve got to object or you’ve forfeited the issue. That certainly

constitutes prejudice to Garcia, given that he will now be required to pay \$1,000 in restitution even though – at least arguably – there is no legal basis for requiring him to pay it.

(3) There is no meaningful distinction between a factual basis complaint and an evidentiary sufficiency complaint

This Court’s opinion attempts to distinguish factual basis sufficiency from evidentiary sufficiency:

Under *Idowu v. State*, a propriety complaint must be preserved, but a factual-basis complaint may not need to be preserved because it could be construed as an evidentiary sufficiency complaint. . . . But *Idowu* offered no guidelines *for construing a factual-basis complaint to be an evidentiary-sufficiency complaint* or for distinguishing a factual-basis complaint from a propriety challenge.

Garcia v. State, No. PD-0025-21, 2022 Tex. Crim. App. LEXIS 129, at *1-2 (Crim. App. Mar. 2, 2022).

Claims regarding sufficiency of the evidence need not be preserved at the trial court level. *Moore v. State*, 371 S.W.3d 221, 225 (Tex. Crim. App. 2012). “Factual basis” is synonymous with “evidence” *See Fisher v. United States*, 328 U.S. 463, 470 (1946) (“The evidence furnishes

the factual basis for a jury's conclusion as to guilt and its degree, guided by the instructions of the court as to the law.”); *United States v. Jones*, 969 F.3d 192, 198 (5th Cir. 2020) (“Because the statements in the factual basis form an adequate evidentiary foundation for Jones's guilty plea, Jones has shown no error.”). In federal court a trial court cannot accept a guilty plea unless there is a sufficient factual basis for the plea. Fed. R. Crim. P. 11(b)(3). And restitution orders require a factual basis. *See United States v. Aubin*, 87 F.3d 141, 150 (5th Cir. 1996) (“Under the circumstances, we find that the RTC's letter provided an adequate factual basis for the district court's restitution order.”); *United States v. Brown*, 699 F.2d 704, 711-12 (5th Cir. 1983) (“Some factual basis must be set forth to support a specific amount that Bowie County suffered in losses or damages resulting from the offenses for which Brown was convicted.”).

For all these reasons, Garcia respectfully requests that this Court reconsider its opinion.

Respectfully submitted,

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I certify that on the 9th day of March, 2022, I electronically filed the foregoing with the TexFile system which will send notification of such filing to:

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1. This motion for rehearing complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(D) because the motion contains 1,114 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

2. This motion complies with the typeface requirements of Tex. R. App. P. 9.4(e) and the type style requirements of Tex. R. App. P. 9.4(e) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century, size 14 font.

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